THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.14030 of 1996

Dated 27-09-2005

Between:

M/s. Aluminum Industries Limited. .. **PETITIONER**

AND

Industrial Tribunal-II and others. .. **RESPONDENTS**

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ORDER:

The award of the Industrial Tribunal-II, Hyderabad in M.P.No.4 of 1994 in I.D.No.1 of 1994 dated 27-3-1996 is impugned in this writ petition.

Facts, to the extent necessary for this writ petition, are that the petitioner, a public limited company, with manufacturing units at Kondra, Hyderabad and in Orissa, had periodically entered into settlements with respondents 2 and 3 herein. One such settlement entered into, under Section 18(1) of the Industrial Disputes Act, on 27-8-1991 related to payment of incentives linked to production and was to be effective for one year from 1-7-1991 to 30-6-1992. The said settlement provided that both parties would endeavour to replace the settlement with a new incentive scheme before 30-6-1992. The petitioner issued a notice on 1-4-1994, informing that the operation of the said settlement was suspended with effect from 1-4-1994, that no payment would be made as per the said settlement from 1-4-1994 onwards.

The petitioner's factory was under lock out from 3-8-1993 till 5-9-1993 and the dispute, regarding payment of wages for the lock out period, was referred by the Government for adjudication to the Industrial Tribunal-II (hereinafter referred to as the Tribunal) in G,O.Rt.No.3729 dated 27-12-2003. The dispute was numbered as I.D.No.1 of 1994 and was pending, when the incentives payment, pursuant to Section 18(1) settlement, was stopped by the petitioner with effect 1-4-1994. Both respondents 2 and 3 unions filed applications under Section 33-A of the Industrial Disputes Act, in M.P.No.4 of 1994 before the Tribunal, in the pending I.D.No.1 of 1994, contending that stoppage of incentive payment by the petitioner-management, with effect from 1-4-1994, was in violation of Section 33(1)(a) of the Industrial Disputes Act. The petitioner raised several contentions before the Tribunal including maintainability of the application filed in M.P.No.4/94.

The Industrial Tribunal, by award dated 27-3-1996, set aside the notice dated 1-4-1994 issued by the petitioner and directed them to continue to pay incentive allowance to the workmen of the respondents 2 and 3 unions from 1-4-1994 onwards, as agreed under the memorandum of settlement, till it was replaced by a new incentive scheme to be negotiated between the parties. The Petitioner was further directed to pay arrears of the incentive allowance from 1-4-1994 onwards to the workmen of respondents 2 and 3 unions herein within a period of three months from the date of publication of the award, failing which the petitioner was directed to pay interest at 12% per annum thereon.

The Tribunal rejected the petitioner's contention that it was open to the management to terminate the settlement (Ex.W.1) unilaterally as the operation of the settlement had expired by 30-6-1992. The Tribunal held that in the absence of any newly negotiated settlement or issuance of two months notice, there was a statutory continuity of the settlement, even after expiry of the period agreed upon (i.e., upto 30-6-1992), that the management, by issuance of the notice dated 1-4-1994 (Ex.W.2), had tried to bring about a change in the conditions of service without obtaining prior permission in writing for this proposed action from the Tribunal, they had contravened the provisions under Section 33 of the Industrial Disputes Act and therefore the application filed by the unions under Section 33-A of the Industrial Disputes Act was maintainable. The Tribunal held that if, indeed, as contended by the petitioner, they were not in a position to pay the incentive allowance, as agreed under the Section 18(1) settlement, nothing prevented them from seeking recourse to the provisions under Section 19(2) of the Industrial Disputes Act to put an end to the said scheme by issuing a notice or from entering into a newly negotiated settlement. The Tribunal held that the evidence adduced on behalf of the petitioner was not

sufficient to conclude that they were not in a position to pay incentive allowance to their workmen, and that the petitioner management had contravened the provisions of Section 33 of the Industrial Disputes Act. The Tribunal held that the workmen were entitled to the incentive payment as agreed under the said settlement till it is replaced by a new scheme as negotiated between the parties. The Tribunal held that the notice dated 1-4-1994 issued by the petitioner, suspending operation of the settlement entered into under Section 18(1) of the Act, was illegal and without jurisdiction and that the workmen of the respondent unions were entitled to seek incentive payment, under the said memorandum of settlement dated 27-8-1991, till it is replaced by a new incentive scheme negotiated between the parties.

Before this Court Sri V.Srinivas, learned counsel for the petitioner, reiterates the contentions raised before the Industrial Tribunal. Learned counsel would submit:

(1) The application filed under Section 33-A was not maintainable since payment of incentive is not a condition of service under Schedule IV of the Industrial Disputes Act;

(2) Since the settlement expired on 30-6-1992 and the unions were called upon to enter into a new settlement, the settlement must be deemed to have been terminated by that date itself and there was no binding settlement between the parties;

(3) Section 33 of the Act had not been violated by the petitioner since payment of incentives is in no way connected with the pending dispute in I.D.No.1/94 and therefore the application under Section 33-A is not maintainable.

(4) Payment of incentives could not be treated as an allowance under Item No.3 of Schedule IV to the Industrial Disputes and as such Section 9-A was not applicable and consequently no notice under Section 9-A of the Industrial Disputes Act need be given;

(5) Since Section 19(2) of the Act provides that a settlement would expire on completion of the period prescribed and after two months of an intimation by the petitioner expressing its intention to terminate the agreement, the settlement is deemed to have expired on 1-6-1994 (two months after the notice was issued on 1-4-1994).

Learned counsel would rely on ***PALI ELECTRICITY CO. LTD. V. INDUSTRIAL TRIBUNAL***; ***HINDUSTAN LEVER LIMITED V. RAM MOHAN RAY; O.A. OOMMEN O.A.ABRAHAM V. THE MANAGEMENT OF HINDUSTAN AERONAUTICS LTD;*** and ***THE INDIAN LINK CHAIN MANUFACTURERS LTD V. THE WORKMEN*** in this regard.

Sri V.Viswanatham, learned counsel appearing on behalf of the respondents – unions, would seek to sustain the award of the Industrial Tribunal and submit that since incentive is a part of the wages due to an employee and since the dispute in I.D.No.1/94 related to non-payment of wages during the lockout period, unilateral withdrawal of the incentive allowance, vide notice dated 1-4-1994, was an issue directly connected with the pending dispute in I.D.1/94 and the respondents were therefore entitled to file an application under Section 33-A of the Act. Learned counsel would submit that the impugned notice dated 1-4-1994 does not amount to termination of the settlement since it merely states

that the petitioner had decided to suspend operation of the memorandum of settlement with effect from 1-4-1994. Learned counsel would submit that suspension of the operation of the settlement cannot be equated to termination which a prerequisite for attracting the provisions of Section 19 of the Industrial Disputes Act. Learned counsel would further submit that the notice dated 1-4-1994 does not stipulate that the settlement would come to an end two months thereafter and in the absence of the period prescribed, under Section 19 (2), of two months, being specifically referred to in the notice, it is not a notice under Section 19(2) of the Industrial Disputes Act and the provisions of Section 19 of the Act would have no application. Learned counsel would submit that the settlement is deemed to be in continuous operation and the declaration of the Tribunal in this regard is legal and valid. Learned counsel would further submit that clause-3 of Schedule IV relates to “compensatory and other allowances” and since the incentive payable by the petitioner, under the memorandum of settlement dated 27-8-1991, is akin to an allowance, it would be a condition of service for change of which a notice under Section 9(A) of the Industrial Disputes Act is required to be given and in the absence of any such notice being given by the petitioner, under Section 9-A, informing the workmen of the proposed change in the conditions of service applicable to them in respect of matters specified in IV schedule, no such change could have been effected. Learned counsel would contend that on all these counts, the award of the Tribunal is required to be upheld and in support of his submissions reliance is placed on ***HINDUSTAN STEEL WORKS V. HINDUSTAN STEEL WORKS CONSTRUCTION LTD. EMPLOYEES UNION***; ***SHUKLA MANSETA INDUSTRIES PVT. LTD V. WORKMEN***.

Before the rival contentions are examined, it is necessary to refer to certain provisions of the Industrial Disputes Act.

Chapter II-A of the Industrial Disputes Act relates to notice of change and Section 9-A thereunder reads thus:

> "9-A. Notice of change:- No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,-
>
> a. with out giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or
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> b. within twenty one days of giving such notice;
>
> Provided that no notice shall be required for effecting any such change-
>
> a. where the change is effected in pursuance of any settlement or award; or
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> b. where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services [Classification, Control and Appeal] Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations. Civiliance in Defence Services (Classification, Control and Appeal) Rules of the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf, by the appropriate Government in the Official Gazette apply."

Section 9-A prohibits any change being effected by an employer, to any

conditions of service applicable to the workmen, in respect of any matter specified in Schedule IV, without giving notice in the prescribed manner to the workmen likely to be affected by such change; of the nature of change proposed to be effected and within 21 days of giving such notice. The IV Schedule gives details of the conditions of service for change of which notice is required to be given. Item 3 thereof relates to “compensatory and other allowances”.

Section 2(p) of the Industrial Disputes Act defines “settlement”

> “to mean a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer”

Section 18 of the Industrial Disputes Act specifies the persons on whom settlement and awards are binding and reads as under:

> “**18. Persons on whom settlements and awards are binding:-**
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> (1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.
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> (2) Subject to the provisions of sub-section (3), an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration
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> (3) A settlement arrived at in the course of conciliation proceedings under this Act or an arbitration award in a

case where a notification has been issued under sub-section (3A) of section 10A or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on-

(a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part.

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part"

Section 19 which relates to the period of operation of the settlement reads thus:

"**Period of operation of settlements and awards**:-

1. A settlement (x x x) shall come into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.

2. Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute, and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice

in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.

3. An award shall, subject to the provisions of this Section, remain in operation for a period of one year from thedate on which the award becomes enforceable under Section 17-a.

Provided that the appropriate Government may reduce the said period and fix such period as it thinks fit:

Provided further that the appropriate Government may before the expiry of the said period, extend the period of operation by any period not exceeding one year at a time as it thinks fit, so however, that the total period of operation of any award does not exceed three years from the date on which it came into operation.

4. Where the appropriate Government, whether of its own motion or on the application of any party bound by the award, considers that since the award was made, there has been a material change in the circumstances on which it was based, the appropriate Government may refer the award or a part of it to a Labour Court, if the award was that of a Labour Court or to a Tribunal, if the award was that of a Tribunal or of a National Tribunal for decision whether the period of operation should not, by reason of such change be shortened and the decision of Labour Court or the Tribunal as the case may be, on such reference shall, be final.

5. Nothing contained in sub-section (3) shall apply to any award which by its nature, terms or other circumstances does not impose, after, it has been given effect to any continuing obligation on the parties bound by the award.

6. Notwithstanding the expiry of the period of operation under sub-section (3), the award shall continue to be binding on the parties until a period of two months has lapsed; from the date on which notice is given by any party bound by the award to the other party or parties

intimating its intention to terminate the award.

7. No notice given under sub-section (2) or sub-section (6) shall have effect, unless it is given by a party representing the majority of persons bound by the settlement or award, as the case may be."

Section 33 of the Industrial Disputes Act reads as under:

"SECTION 33 Conditions of service, etc., to remain unchanged under certain circum- stances during pendency of proceedings

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman,-

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman :

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one

month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman;

save with the express permission in writing of the authority before which the proceeding is pending.

Explanation:- For the purpose of this sub-section, a “protected workman” in relation to an establishment, means a workman who, being a member of the executive or other office bearer of a registered trade union connected with the establishment, is recognized in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one per cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner , in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer. Board,an arbitrator, a Labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, within a period of three months from the date of receipt of such application such order in relation thereto as it deems fit :

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further

period as it may think fit :

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed"

Section 33-A is a special provision, for adjudication as to whether conditions of service etc., could be changed during the pendency of proceedings, and reads thus-

"SECTION 33A Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:-

Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer. Board, an arbitrator, a Labour Court, tribunal or National Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, -in the prescribed manner,-

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and

(b) to such arbitrator. Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon-the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly"

It is not necessary for this court to examine all the contentions raised in the writ petition, inasmuch as, the writ petition is required to be allowed on the ground that the Tribunal had failed to adjudicate upon the question as to whether the change in conditions of service, resulting from the notice dated 01-

04-1994, suspending payment of incentives, is connected to I.D.No.1 of 1994, then pending before the Tribunal.

Section 33-A enables any employee, aggrieved by the contravention of the employer of the provisions of Section 33, during the pendency of proceedings before an Industrial Tribunal, to make a complaint in writing in the prescribed manner, and on receipt of such complaint, the Tribunal is required to adjudicate upon the complaint as if it were a dispute, referred to or pending before it, in accordance with the provisions of the Industrial Disputes Act and to submit its award to the appropriate Government.

The application which an employee, is entitled to make, under Section 33-A, is for contravention of the provisions of Section 33. Section 33 of the Industrial Disputes Act, provides for the conditions of service etc., to remain unchanged under certain circumstances during the pendency of the proceedings. Sub-Section (1)(a) of Section 33 requires that, during the pendency of proceedings before a Tribunal, in respect of an Industrial Dispute, no employer shall, in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding. In order to attract the provisions of Section 33(1)(a), compliance of which is required to enable an application to be filed under Section 33-A, it has to be established that:

(a) There is a dispute pending before an Industrial Tribunal;

(b) The conditions of service applicable to the workmen before commencement

of the said proceedings, has been altered by the employer; and

(c) Alteration of the conditions of service **is in regard to any matter connected with the dispute** and is to the prejudice of the workmen concerned in such dispute.

While it could be said that non-payment of incentives would prejudice the workmen, all of whom are concerned in the dispute in I.D.No.1/94, Section 33(1)(A) prohibits alteration of conditions of service **in regard to any matter concerned with the dispute**. Thus, it is only when there is an alteration of the conditions of service, **in regard to any matter connected with I.D.No.1 of 1994**, that an application under Section 33-A could have been maintained by the workmen. A specific plea in this regard has been raised by the employer, which has also been taken note of by the Tribunal in paragraph 3 of its award. The contention of the employer, as noted by the Industrial Tribunal, reads as under:

> "…… The petition under Section 33-A of the Act itself is not maintainable since the payment of incentive has got no connection with the subject matter pending before this Tribunal in I.D.No.1 of 1994. It is only in respect of the matters which are connected with the pending dispute that the employer is required to take the permission of the Court before altering the service conditions of the employees….."

This question goes to the root of the matter and as a specific plea had been raised by the Management in this regard, the Tribunal ought to have adjudicated upon this jurisdictional fact. It is only if the connection, between the change in conditions of service and the pending dispute before the Tribunal is established, would an application under Section 33-A of the Industrial Disputes Act, be maintainable.

The provisions of Section 33(1)(a) of the Industrial Disputes Act is clear and, as such, no authority is required in this regard. However, Sri V.Srinivas, learned counsel for the petitioner, relies on ***PALI ELECTRICITY*** (1 supra) and ***O.A.OOMMEN*** (3 supra), which may, briefly, be referred to.

In ***PALI ELECTRICITY*** (7 supra), the Division Bench of Rajasthan High Court, held :

> "..... Section 33(1)(a) applies only in regard to any matter connected with the dispute pending before the Court or Tribunal. If the matter is not connected with the dispute pending before the Court or Tribunal, other sub-sections of Section 33 apply. To give jurisdiction, therefore, to the Tribunal to entertain a complaint under Section 33A, read with Section 33(1)(a), it had to be shown in this case that the matter which was brought before it on complaint by the workmen was connected with the dispute which was pending before it....."

The Division Bench of the then Mysore High Court, in ***O.A.OOMMEN*** (3 supra), took a similar view as taken by the Division Bench of the Rajasthan High Court.

Sri V.Vishwanadham, learned counsel for the respondents would however, would submit that since the dispute relates to the year 1994 and since more than eleven (11) years have since elapsed, this question should be decided in the writ petition itself and remanding the matter to the Tribunal would result in further delay. The jurisdiction exercised by this court, in certiorari proceedings, is supervisory and not appellate. It is for the Tribunal to adjudicate this question and give its finding thereon and not for this court to examine in proceedings

under Article 226 of the Constitution of India.

I find considerable force, however, in the submission of Sri V.Vishwanadham, learned counsel for the respondents, that the matter requires expeditious consideration by the Tribunal. The order in M.P.No.4 of 1994 in I.D.No.1 of 1994 is set aside and the matter is remanded to the Tribunal, which shall decide this question, after hearing both parties, as expeditiously as possible, in any event, not later than four months from the date of receipt of a copy of this order.

The writ petition is accordingly disposed of. No order as to costs.

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RAMESH RANGANATHAN, J

Dated: 27-09-2005

Prv